THE OWNERSHIP OF COMMUNITY PROPERTY

THIS paper does not purport to discuss the origin and history or present status of the community property system. It may however be desirable to make a brief introductory statement for the benefit of those who have not found it necessary or convenient to familiarize themselves with the general notions of the system. To most of us who grew up on the common-law pabulum of dower and curtesy the *jus mariti* and tenancies of the entireties, the idea of a system which recognizes the proprietary equality of the spouses is attractive, and we have seen efforts being made toward such equality by legislative reformation of the common law.

The community system occupies itself with two kinds of property, separate property being as essential to the system as community property. It is rather easier to define separate than community property, and one may thereafter say, to cover up his difficulty, that all other is community. All property possessed at the time of marriage by either spouse, and all acquired thereafter by gift, devise, or descent, is separate. All other property is community. But one may do a little better than that, by indicating the chief sources of acquisition of community property, to wit: property in public lands acquired from the government, as under the homestead laws;[1] property acquired by adverse possession, borrowed money and purchases on credit; accessions and fixtures; damages resulting from personal injuries to a spouse; earnings of spouses and the investments thereof and the enhancement of investments; reinvestments; proceeds from life insurance; rents, issues, and profits of separate property, in some jurisdictions, etc. The chief notion concerning such acquisitions is, that they result mainly from the joint efforts of the spouses, while the marital relationship is sustained — the matrimonial gains.

The nature of the community property system on the Continent and the ownership of the community property there, is likewise beyond the purview of this paper, which attempts to make a

[1] See brief discussion of this topic by the writer in May number, 1921, 9 CALIFORNIA L. REV. 267.

dogmatic exposition of such ownership, more especially of the nature of the wife's interest, in the eight states of the Union, where the system has been established.[2]

Mr. Tiffany, in the new edition of Tiffany on Real Property, in Chapter VII, under the heading Co-ownership, discusses Joint Tenancy; Tenancy in Common; Coparcenary; Tenancies by the Entireties; Partnership Property; and devotes in addition one section consisting of about two full pages, or about four pages with footnotes, to community property. He does not examine the general sources of acquisition during marriage. He refers to the liability of community property for "community debts" without suggesting the character of the "community debts," and briefly refers to the descent of community property. As to the nature of the ownership of such property he seems to indicate that there are but two views, — a California-Louisiana view, and a Texas-Washington view.[3] These statements are substantially all borrowed and many of them are exceedingly misleading.

As a matter of fact there are four theories regarding the nature of the ownership of community property, and they differ essentially from each other in regard to the nature of the wife's interest. These theories are here called, for convenience, the California or single ownership, the Washington or entity, the Idaho or double ownership, and the Texas or trust theories, respectively.

The California or Single Ownership Theory

The California theory is that the husband owns the community property, that the wife has a mere expectancy and not a vested interest, that her interest, whatever it is, is a sort of incumbrance upon the husband's absolute title;[4] that her interest vests only when the husband predeceases her.[5] This view of absolute

[2] The states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington.

[3] 1 Tiffany, Real Property, 2 ed., 1920, § 195.

[4] Spreckels *v.* Spreckels, 116 Cal. 339, 48 Pac. 228 (1897); Clavo *v.* Clavo, 10 Cal. App. 447, 102 Pac. 556 (1909); *In re* Burdick's Estate, 40 Pac. 35 (Cal., 1895); Fennell *v.* Drinkhouse, 131 Cal. 447, 63 Pac. 734 (1901). In the opinion of Attorney General Palmer rendered February 26, 1921, at page 435, it is held that in California the income-tax returns from community property may not be reported, one half by each of the spouses, but they should be reported as a whole by the husband.

[5] Packard *v.* Arellanes, 17 Cal. 525 (1861).

ownership is regarded by the courts apparently as consistent with the fact that the husband cannot alienate in fraud of the wife,[6] nor dispose of more than one-half interest by will,[7] together with other statutory impediments imposed on his absolute ownership.[8] A statute requiring the wife's consent in writing before the husband can dispose of community property by gift was held, in *Spreckels* v. *Spreckels*,[9] not to be applicable to property acquired before the statute was passed, because it deprived the husband of a vested interest. It was also held that when property was acquired after that date, the statute did not make a voluntary alienation by the husband wholly void where the wife did not so consent, but that it was voidable at the election of the wife, and that it became valid by the recognition of it by the surviving widow when in her will she referred to such gift made by her husband as a reason for making a particular disposition therein;[10] and that she was put to her election to take under her husband's will, and her election was sufficient to validate the title created by her husband's gift. The court further said that there was no intention by this statute to interfere with the husband's ownership and that the title remained wholly in him as before. Such a provision does not vest in the wife any interest in the community property during the marriage; she has nothing more than a right to revoke the gift.[11]

In California the one-half interest which the wife receives on the death of the husband is inherited,[12] and so as heir of her husband she must pay an inheritance tax.[13] An action can be maintained against the spouses for specific performance of a contract entered into with the husband to convey community land, and the husband has the power to convey without the consent of the wife.[14]

The statute requiring that "the wife must join with him (the husband) in executing any instrument by which the community

[6] Smith *v.* Smith, 12 Cal. 216 (1859); Lord *v.* Hough, 43 Cal. 581 (1872).

[7] Beard *v.* Knox, 5 Cal. 252 (1855).

[8] KERR, CYCLOPEDIC CODES OF CALIFORNIA, 1920; CIVIL CODE, §§ 146, 164, 168, 172, 172 a, 1401, and 1402. *Cf.* Steinberger *v.* Young, 175 Cal. 81, 165 Pac. 432 (1917).

[9] 116 Cal. 339, 48 Pac. 228 (1895).

[10] Spreckels *v.* Spreckels, 158 Pac. 537 (Cal., 1916).

[11] Dargie *v.* Patterson, 176 Cal. 714, 169 Pac. 360 (1917).

[12] *In re* Burdick's Estate, 40 Pac. 35 (Cal., 1895), 112 Cal. 387, 44 Pac. 734 (1896).

[13] *In re* Moffitt's Estate, 153 Cal. 359, 95 Pac. 653 (1908).

[14] McClellan *v.* Lewis, 25 Cal. App. Dec. 655, 169 Pac. 436 (1917); Strauss *v.* Canty, 169 Cal. 101, 145 Pac. 1012 (1915). This rule was altered by statute § 172 a in 1917.

real property or any interest therein is leased for a longer period than one year, or if sold, conveyed, or incumbered," [15] does not cause a contract of sale or exchange made by the husband alone to be void in the sense of passing no interest in the land. It is voidable only at the instance of the wife.[16] The property is community though the record title stands in the wife's name.[17] Of course then such property is liable for the debts of the husband,[18] but not of the wife,[19] though apart from statute it was held to be liable for the ante-nuptial debts of the wife.[20]

It results, then, that as the husband "is the absolute owner of the community property the same as he is of his separate property," [21] on death of the wife he does not take anything that he did not have before, *i.e.*, he is not the wife's heir, but rather his interest is relieved of a sort of incumbrance and on her prior death she leaves no interest subject to administration.[22]

This was not always the view of the California court.[23] "Courts and counsel have occasionally endeavored to find some property right in the wife, or some respect in which the husband's interest falls short of full property." [24]

It is probably true, as Mr. Tiffany suggests,[25] that this theory is more nearly in accord with the Spanish theory than any of the others, but it seems interwoven with certain common-law concepts of vested interests probably not existing in the Spanish law. Under the Spanish law "the rents, issues, and profits of separate property" became community property, but the California court,

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[15] CIVIL CODE, 172 a; Packard *v.* Arellanes, 17 Cal. 525 (1861); Gwynn *v.* Dierssen, 101 Cal. 563, 36 Pac. 103 (1894).

[16] Goodrich *v.* Turney, 186 Pac. 806 (Cal., 1920).

[17] Riley *v.* Pehl, 23 Cal. 70 (1863); Parry *v.* Kelly, 52 Cal. 334 (1877); Svetinich *v.* Sheean, 124 Cal. 216, 56 Pac. 1028 (1899). This rule was changed by statute in 1889. See CAL. CIV. CODE, § 164.

[18] Farmers Bank *v.* Drew, 192 Pac. 105 (Cal., 1920).

[19] CIVIL CODE, §§ 167 and 171 a.

[20] Van Maren *v.* Johnson, 15 Cal. 308 (1860); Vlautin *v.* Bumpus, 35 Cal. 214 (1868).

[21] Wright *v.* Rohr, 182 Pac. 469 (Cal., 1919).

[22] *In re* Klumpke's Estate, 167 Cal. 415, 139 Pac. 1062 (1914); Packard *v.* Arellanes, 17 Cal. 525 (1861).

[23] Beard *v.* Knox, *supra*, note 7; Godey *v.* Godey, 39 Cal. 157 (1870).

[24] See Spreckels *v.* Spreckels, 116 Cal. 339, 48 Pac. 228 (1897).

[25] 1 TIFFANY, REAL PROPERTY, 2 ed. (1920), § 195. Rule changed by statute in 1889. See CAL. CIV. CODE, § 164.

deriving its inspiration from the common law, has held that a statute transferring such future rents, issues, and profits to the community was unconstitutional.[26] The implied criticism of the logic of this view in *Warburton* v. *White*,[27] and particularly in *Arnett* v. *Reade*,[28] by Mr. Justice Holmes, should be noted. "The notion that the husband is the true owner arises by confusion between the practical effect of the husband's power and its legal ground; if not by a mistranslation of ambiguous words like *dominio*." He observes that the notion on which the state decision had been based was "that during the joint lives the husband was the owner in substance, the wife having a mere expectancy, and that the old saying was true, that the community is a partnership which begins only at its end."

The Washington or Entity Theory

The Washington theory of the community of husband and wife is that the spouses constitute an entity,[29] and that this entity is the owner of the property, in which entity the members are equal in right and interest,[30] although the husband is constituted by statute the managing agent. Even the absolute power of disposition does not create in him a larger proprietary interest in the community property than the wife possesses.[31] The husband is the agent of the entity, not of the individuals, and this statutory agency may be altered or annulled at the pleasure of the legislature.[32] "The individuality of both spouses is merged, in so far as property acquired by either after marriage is concerned, and the title to property . . . vests in such entity." [33]

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[26] George *v.* Ransom, 15 Cal. 322 (1860).

[27] 176 U. S. 484 (1900). [28] 220 U. S. 311 (1911).

[29] Holyoke *v.* Jackson, 3 Pac. 841 (Wash., 1882); Oregon Impr. Co. *v.* Sagmeister, 4 Wash. 710, 30 Pac. 1058 (1892); Stockland *v.* Bartlett, 4 Wash. 730, 31 Pac. 24 (1892); Shorett *v.* Signor, 58 Wash. 89, 107 Pac. 1033 (1910); Miller *v.* Maddocks, 58 Wash. 695, 107 Pac. 1036 (1910); Wasmund *v.* Wasmund, 90 Wash. 274, 156 Pac. 3 (1916); Olive *v.* Meek, 103 Wash. 467, 175 Pac. 33 (1918); Ostheller *v.* Spokane, I. E. Ry. Co., 107 Wash. 678, 182 Pac. 630 (1919).

[30] Mabie *v.* Whittaker, 10 Wash. 656, 39 Pac. 172 (1895); Marston *v.* Rue, 92 Wash. 129, 159 Pac. 111 (1916); Holyoke *v.* Jackson, 3 Pac. 841 (Wash., 1882).

[31] Warburton *v.* White, see note 27, *supra*.

[32] Holyoke *v.* Jackson, see note 29, *supra;* Mabie *v.* Whittaker, see note 30, *supra;* Hill *v.* Young, 7 Wash. 33, 34 Pac. 144 (1893).

[33] Ostheller *v.* Spokane & I. E. Ry. Co., see note 29, *supra*.

Among the acquisitions after marriage are the damages arising from personal injuries to either spouse. The entity being the real party in interest must sue therefor through its managing agent, and if its agent has contributed to the injury by his negligence, there can be no recovery.[34]

A further result of the entity theory and the proprietary equality of the spouses is, that the community property is not liable for the separate obligations of the husband,[35] whether arising from contract[36] or tort.[37] It was at one time thought that although the community real estate could not be made liable for the husband's separate obligations, yet the community personalty could be so made liable, because the husband had the absolute power of alienation, equally as in the case of his separate property.[38] But the court subsequently saw the inevitable result of its own logic, and that power of alienation was not the equivalent of proprietary interest, and held that personalty also was not liable.[39]

The Washington court, however, does not always follow the logic of its position, and it seems desirable here to consider two different sets of cases. The first set[40] involves generally the question whether, when a husband acquires land within the state, under a statute which requires the wife to join in an incumbrance or alienation thereof, the wife not having come to the state for some reason or other, he may alienate the land to a *bona fide* purchaser for value without notice of the marital relationship, the husband having represented himself to be a bachelor or widower, and in some cases having recited such statement in his conveyance.

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[34] Ostheller *v.* Spokane & I. E. Ry. Co., see note 29, *supra.*

[35] *A fortiori* of course the community property would not be liable for the separate obligations of the wife since the husband is the statutory manager. The subject of "Community Obligations," however, will be discussed in a subsequent paper and so is not considered at length here.

[36] Case Threshing Machine Co. *v.* Wiley, 89 Wash. 597, 154 Pac. 437 (1916).

[37] Schramm *v.* Steele, 97 Wash. 309, 166 Pac. 634 (1917).

[38] Powell *v.* Pugh, 13 Wash. 577, 43 Pac. 879 (1896); Gund *v.* Parke, 15 Wash. 393, 46 Pac. 408 (1896); Morse *v.* Estabrook, 19 Wash. 92, 52 Pac. 531 (1898).

[39] Schramm *v.* Steele, see note 37, *supra*, where the cases are reviewed and the cases cited in note 38, *supra*, overruled.

[40] Sadler *v.* Niesz, 5 Wash. 182, 31 Pac. 630 (1892); Nuhn *v.* Miller, 5 Wash. 405, 31 Pac. 1031 (1892); Schwabacher *v.* Van Reypen, 6 Wash. 154, 32 Pac. 1061 (1893); Canadian & A. Mtg. & T. Co. *v.* Bloomer, 14 Wash. 491, 45 Pac. 34 (1896); Daly *v.* Rizzutto, 59 Wash. 62, 109 Pac. 276 (1910).

In *Sadler* v. *Niesz*[41] the husband deserted his wife in Pennsylvania and came to Washington. Thereafter he purchased land, and while representing himself to be a widower, conveyed the same to the defendant. The wife on coming to Washington took up her residence with him for a time, and on discovering the fact of the conveyance, joined her husband in an action to recover the land. The court, being greatly influenced by the unfairness of the situation as regards the purchaser, the members of the court not really agreeing on the reason, held that plaintiff could not recover. The main ground, however, as to the wife, is estoppel from asserting the relationship, and that as to the public the marital relationship did not exist. *Nuhn* v. *Miller*[42] and *Schwabacher* v. *Van Reypen*[43] are similar, save that the latter involved a mortgage made by the husband which contained a recital that he was unmarried. It does not appear where the wife was at the time. The facts are also substantially the same in *Canadian & A. Mortg. Co.* v. *Bloomer*,[44] and in *Daly* v. *Rizzuto*.[45] In the latter case the court said that where a wife seeks to establish her community interest against one who purchased from her husband's grantee for value on a clear record title, she has the burden of showing that defendant purchased with notice of her equity.

The last case could probably be defended on the ground of express statutory provisions[46] then in force, but the court does not rely on them but rather on the prior cases. The court may have been unconsciously influenced by certain Texas decisions, which under the Texas doctrine are quite defensible.

But how, if the entity owns the property and the husband is expressly denied the power of alienation as its agent, can estoppel be asserted against the wife under such circumstances? Does a deserted wife owe an express duty to strangers to live with her husband? Judging from *Adams* v. *Black*,[47] we must so conclude. In the latter case the husband had likewise conveyed land to a purchaser, by representing himself to be an unmarried man and the purchaser did not have notice of the marital relationship. The

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[41] See note 40, *supra*.
[42] See note 40, *supra*.
[43] See note 40, *supra*.
[44] See note 40, *supra*.
[45] See note 40, *supra*.
[46] REM. & BAL. CODE, §§ 8771 and 8772.
[47] 6 Wash. 528, 33 Pac. 1074 (1893).

spouses were cohabiting, however, and the court held that no title passed by a conveyance by the husband alone.

The deserted wives in the above cases made no misrepresentation. Would it have made a difference if they had been insane or invalid? The hardship on the husband's grantee would have been equally great. If the husband does not own the property and is not the agent of the entity to alienate, what title can he pass? Dower which is an inferior and inchoate right cannot be so extinguished at common law.[48]

There is, strictly, only one objectionable case in what is above referred to as the other set of cases inconsistent with the Washington view.[49] But the majority of the court regarded certain three cases as being parallel. In *Anders* v. *Bouska*,[50] the record title to certain community land stood in the name of the wife. Thereafter an action was begun by B against the husband for a community debt, and a writ of attachment was levied on the land. Subsequently the wife conveyed this land to A, a purchaser who secured an abstract. The abstract did not show the attachment lien, because it was indexed against the husband and not against the wife. After judgment for plaintiff against the husband and levy of execution, a sale was ordered and B purchased the land at the sale. It was held that A took the land clear of the lien, the majority of the court relying upon two earlier cases, *Clerf* v. *Montgomery* and *Johnson* v. *Irwin*;[51] Rudkin, J., dissenting, pointed out clearly the majority's misconception of the law.

In the *Clerf* case, the land had been conveyed to the wife *by the husband* in fraud of creditors. Thereafter and without any action being brought to set aside this conveyance, an attachment was filed against the property of the husband in the county. Just before judgment was obtained against him by his creditor, the wife sold the land to a *bona fide* purchaser. Reversing the decree of the lower court, the Supreme Court held that the purchaser took the land clear of the attachment lien because there was no notice

[48] Williams *v.* Lambe, 3 Bro. Ch. 264 (1791); Randolph *v.* Doss, 4 Miss. 205 (1839); Mason *v.* Dierks Lumber Co., 94 Ark. 107, 125 S. W. 656 (1910), 26 L. R. A. (N. S.) 574, where there is a note with citation of other cases, and circumstances.

[49] Anders *v.* Bouska, 61 Wash. 393, 112 Pac. 523 (1910). The other two are Clerf *v.* Montgomery, 15 Wash. 483, 46 Pac. 1028 (1896); and Johnson *v.* Irwin, 16 Wash. 652, 48 Pac. 345 (1897).

[50] See note 49, *supra*.

[51] See note 49, *supra*.

of the attachment given to the purchaser, the attachment not being indexed against her. It is submitted that this case in no wise supports the *Anders* case. Here the wife held the property as her own separate estate, because there is a clear presumption that when the husband conveys property to the wife he makes her a gift [52] if she does not pay a consideration from her own funds, and the statute so provides. She had a defeasible title good till defeated. There was no such presumption in the *Anders* case, the conveyance being from a third person, and when so conveyed a community interest is presumed.[53]

In the *Johnson* case, certain actions had been begun in November, 1894, against one Bennett, a non-resident defendant, and a certain tract of land was attached as his. In September, 1893, Bennett had conveyed this land to one Irwin. Irwin, on January 1, 1895, conveyed the same to one Johnson to secure his note to Johnson. On January 9, 1895, Irwin intervened in the suits against Bennett, claiming title to the attached land. On the trial it was adjudged that the conveyance to Irwin was *sans* consideration and in fraud of creditors, and the conveyance was ordered set aside and the attachment lien was adjudged good. Thereafter the land was sold to satisfy this judgment and the purchaser was let into possession. On Irwin's subsequent failure to pay his note Johnson foreclosed, and the court held his mortgage was a first lien. In this case, likewise, Irwin had a defeasible title, and before it was defeated his conveyance to a *bona fide* purchaser passed of course a valid interest. Thus neither of the two latter cases is in point in support of the first one.

The Idaho or Double Ownership Theory

In Idaho the interests of the spouses are equal and of the same sort. Whereas in Washington neither spouse owns the community property, in Idaho both own it, that is, each owns an undivided and indivisible one half of it. Each has a legal title equal to that of the other without reference to which spouse

[52] Hayden *v.* Zerbst, 49 Wash. 103, 94 Pac. 909 (1908); Stewart *v.* Kleinschmidt, 51 Wash. 90, 97 Pac. 1105 (1908); Powers *v.* Munson, 74 Wash. 234, 133 Pac. 453 (1913); Woodland Lumber Co. *v.* Link, 16 Wash. 72, 47 Pac. 222 (1896); Patterson *v.* Bowes, 78 Wash. 476, 139 Pac. 225 (1914).

[53] Carpenter *v.* Brackett, 57 Wash. 460, 107 Pac. 359 (1910).

holds the record title.[54] This theory has the largest numerical support of all, being followed in Arizona, Nevada, and New Mexico.[55]

The husband, accordingly, cannot convey alone a good title to a *bona fide* purchaser who has no notice of the community relationship even though that relationship has ceased to exist, and the land still stands in the husband's name,[56] when he is not the community heir of his deceased wife. Oddly enough, however, the community property is liable to be taken for the separate obligations of the husband whether they arise from contract [57] or tort.[58] Oddly, because since the conjugal interests are not severable,[59] the property of one person is taken to pay another's obligations. Thus if *Schramm* v. *Steele* [60] had arisen in Arizona,[61] and presumably in Idaho the community property, including the wife's interest therein would be subject to levy of execution and sale. In that case the husband was sued for damages for the alienation of the affections of another man's wife, and judgment was awarded against him for a considerable sum. The community property, under the Washington theory, was properly held not liable.

The wife does not inherit her one half from the husband as in California, and so pays an inheritance tax only on the other one half received from the deceased,[62] of which the surviving spouse is made the statutory heir,[63] and on the husband's death her formerly vested interest is simply freed from his control.

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[54] Kohny *v.* Dunbar, 21 Idaho, 258, 121 Pac. 544 (1912); Ewald *v.* Hufton, 31 Idaho, 373, 173 Pac. 247 (1918); in Hall *v.* Johns, 17 Idaho, 224, 105 Pac. 71 (1909), the court with slight consideration followed the California theory and held that the wife has only an expectancy in community property. See opinion of Attorney General Palmer of Feb. 26, 1921, referred to in notes 4 *supra*. In Bosma *v.* Harder, 94 Ore. 219, 185 Pac. 741 (1919), the Oregon court held that in Idaho the husband was the absolute owner of the community property and could give it away *sans* the wife's consent, following the California and quite overlooking the Idaho cases.

[55] LaTourette *v.* LaTourette, 15 Ariz. 200, 137 Pac. 426 (1914); Molina *v.* Ramirez, 15 Ariz. 249, 138 Pac. 17 (1914); *In re* Williams' Estate, 40 Nev. 241, 161 Pac. 741 (1916); Beals *v.* Ares, 185 Pac. 780 (N. Mex., 1919). For the earlier view in New Mexico *contra*, see Reade *v.* DeLea, 14 N. Mex. 442, 95 Pac. 131 (1908).

[56] Ewald *v.* Hufton, *supra*, note 54.

[57] Holt *v.* Empey, 32 Idaho, 106, 178 Pac. 703 (1919).

[58] Villescas *et Ux.* v. Arizona Copper Co., 20 Ariz. 268, 179 Pac. 963 (1919).

[59] Stockand *v.* Bartlett, 4 Wash. 730, 31 Pac. 24 (1892).

[60] 97 Wash. 309, 166 Pac. 634 (1917). See note 37, *supra*.

[61] Villescas *v.* Arizona Copper Co., see note 58, *supra*.

[62] Kohny *v.* Dunbar, see note 54, *supra*.

[63] IDAHO COMP. STAT., 1919, § 7803.

Since the Idaho court has clearly declared that each spouse owns an undivided and, during marriage, indivisible one half vested, legal interest in the community property, without reference to which spouse holds the record title, it would seem that where a statute gives the other one half to the survivor on the prior death of the other without leaving a will, such survivor must take this other one half by succession and that the spouse so dying and having been possessed in life of such an interest in community property, must have left an estate subject to the jurisdiction of the probate court. In order to set out clearly the matter of the devolution of community property I quote at length the Idaho statute: [64]

"Upon the death of either husband or wife, one half of all the community property *shall go to the survivor*, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, in favor only of his, her, or their children or a parent of either spouse, subject to the community debts, provided that no more than one half of the *decedent's half of the community property* may be left by will to a parent or parents. In case no such testamentary disposition shall have been made by the deceased husband or wife *of his or her half of the community property*, it shall go to the survivor, subject to the community debts, the family allowance and the charges and expenses of administration; *Provided, however*, that no administration of the *estate* of the wife shall be necessary if she dies intestate."

On analyzing this statute we find in the first part of the section that "one half shall go to the survivor." How does it "go"? Since it is not inherited [65] because it is already owned, this must mean something like "becomes the separate property of the survivor" or is "freed from the limitations previously imposed on it."

[64] IDAHO COMP. STAT., 1919, § 7803.

[65] IDAHO COMP. STAT., 1919, § 7791. Other pertinent sections are as follows: § 7792, "The property, both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of any administrator appointed by that court for the purposes of administration."

Sec. 7834, "When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in this code."

Sec. 6466 provides *inter alia* that the probate court shall have jurisdiction, "2. To grant letters testamentary of administration and of guardianship. . . . 3. To appoint appraisers of estates of deceased persons." Sec. 7803 determines in what cases this jurisdiction is to be exercised.

As to the other one half, it is distinctly referred to as "the decedent's half," which the decedent can dispose of by will absolutely save as to the express limitations therein contained. If it is not so disposed of how shall it descend? "It shall go to the survivor." Of course "go to the survivor" here means something different from the same words in the first part of this section, because we are now dealing with the property of a different person who is at this time deceased.

The writer believes that under this section the deceased's one half interest "passes" to the survivor by succession and not by some notion of survivorship, as in estates by the entireties, or as in joint tenancies, or as one lawyer expressed it, "simply by virtue of the statute," for the following reasons:

(a) The court has said that the interests of each spouse are vested and equal, and that on the prior death of the husband the wife must pay an inheritance tax on the share coming from the husband. The converse must be true that the husband would pay an inheritance tax on the share coming from the deceased wife.

(b) Another section of the code defines "succession" as the "coming in of another to take the property of one who dies without disposing of it by will." [66] That is precisely what happens here.

(c) Joint tenancies are expressly abolished.[67] If the same provision does not expressly abolish tenancies by the entireties, and likewise if the sections of the code establishing community property do not expressly accomplish the same result, they do at least inferentially, and unmistakably too, for the husband and wife cannot be tenants by the entirety and community tenants at the same time. The legislature intended to supplant the common-law system with something different coming from another source and not fettered with common-law notions of tenancy, and survivorship.

(d) In the last part of the above-quoted section the proviso should be noted, "Provided, however, that no administration of the *estate* of the wife shall be necessary if she dies intestate." If her interest went to the husband by a sort of common-law survivorship then there would be no *estate*. The declaration that administration of her estate shall not be necessary if she dies intestate, certainly is not equivalent to saying that she left no estate and the provision

[66] IDAHO COMP. STAT. 1919, §§ 5328 and 5372.

[67] *Id.*, §§ 4656 to 4674.

is quite meaningless if she left no estate. Of course this is also not the equivalent of saying that administration is useless or meaningless. It is not necessary usually, because community debts can be recovered against the husband and out of the community property or his separate property. But if she left separate debts it seems to the writer that administration is quite necessary, for the statute as quoted *supra* [68] indicates that estates of all decedents are liable for their debts. It may be desirable also to have a finding whether she died intestate or not; whether or not she was a married woman; whether she is survived by her husband; and if property stands in her name just what her relation to it is. Otherwise a suit to quiet title would inevitably arise.

It is surprising, therefore, to find the Supreme Court of Idaho, in a recent decision, declaring that if a wife predeceases her husband, possessed of no separate property but leaving community property standing in her name, she left no estate. In *Glover* v. *Brown* [69] the husband has transferred to the wife certain community land, and the deed of transfer recited that the conveyance was made "to her and her heirs for her sole and separate use, benefit, and behoof, forever." The wife predeceased the husband and administration was had upon her estate. The probate court found the land to be community, and decreed it to the husband as the

[68] See § 7834 and note 65, *supra*.

[69] 32 Idaho, 426, 184 Pac. 649 (1919). It should be said, however, that this case was decided under a different statute on devolution. Under the law from 1887 to 1907 the statute, § 5712, read as follows: "Upon the death of the wife, the entire community property without administration *belongs to* the surviving husband, except such portion thereof as may have been set apart to her, by judicial decree for her support and maintenance, which portion is subject to her testamentary disposition, and in the absence of such disposition goes to her descendants or heirs, exclusive of her husband." This statute was borrowed bodily from California, and under the earlier Idaho view (Hall *v.* Johns, *supra*) the same interpretation as in California would naturally be given to it. That view is in fact the one perhaps unconsciously followed by Morgan, C. J. But that view was *dictum*. The California statute does not easily fit in with the view of double ownership, but is not necessarily opposed to it. But the amendment quoted above (text page 57) did not change nor purport to change the nature of the wife's interest, hence her interest under this section was a vested, legal title. Hence "belongs to" must equal "descends to" or "goes to" and is awkwardly said of the part that he already owned as well as that he inherited. The writer knows of only three ways by which the wife's interest could "belong to" the husband on her death (assuming it has been proved that there are no estates by the entireties in Idaho): (a) he was already the owner, as in California; (b) he received it by will; (c) he took it as an heir. There seems to be no fourth way. The first two ways being eliminated, the third remains.

community heir of his wife. After mortgaging the land the husband became insane and a guardian was appointed for him. The mortgage was foreclosed, but the guardian redeemed the land and later sold it at a guardian's sale. The appellants claimed under this guardian's sale. Years after, a minor child of the spouses brought an action to quiet title to a one half interest in this land, which he claimed on the ground that the land was separate, and not community, thus making a collateral attack upon the probate court's decree. The view of Budge, J., who delivered the opinion of the court, was that the probate court was wrong in its finding that the property was community, and that such finding and distribution based thereon was in excess of the court's jurisdiction, and that this attack was direct. Morgan, C. J., concurring in the conclusion, said:

"It is also clear, that tribunal did not have jurisdiction of the community property because *it did not belong to the wife's estate, but on her death, belonged without administration, to the husband.*"

Rice, J., dissenting, still held that the probate court had no jurisdiction because

"*The claim advanced by the husband that the property was community property and belonged to him, not as heir but as owner, is a claim adverse to the estate and presents a question of which the probate court had no jurisdiction.*"

Judge Rice cites two California cases,[70] in which it was held that on the prior death of the wife community property cannot be inventoried as a part of her estate and distributed to the husband, because the husband's claim to the property as community is adverse to the wife's estate. Under the California view that the husband is the absolute owner of the community property, of course no other conclusion could be reached. But under the Idaho theory of ownership, the property standing in a deceased wife's name would presumably be community without a contrary recital, and might be where there was a contrary recital, and a claim that it is community would not be an adverse claim. Or if it is adverse, then on the prior death of the husband the claim that property

[70] *In re* Rowland's Estate, 74 Cal. 523, 16 Pac. 315 (1888); *In re* Klumpke's Estate, 167 Cal. 415, 139 Pac. 1062 (1914). See also Plass *v.* Plass, 121 Cal. 131, 53 Pac. 448 (1898).

standing in his name is community would likewise be adverse, and the probate court would have no jurisdiction. The result, that probate courts do not have jurisdiction over the great mass of community property in the state of Idaho, is probably sufficient to condemn this view. Rice, J., however, clearly points out the error of the court in permitting a collateral attack on what was probably an erroneous but not void judgment of the probate court. The judgment of the probate court presupposes a finding of the probative facts as well as the ultimate character of the property,[71] over which matters the probate court has exclusive original jurisdiction. In California the community property is administered with the husband's estate only, and not with the wife's, because he is the owner.[72] In Washington [73] the community property is administered with the estate of whichever spouse dies first, the interests of each spouse, as in Idaho, being equal. No question of adverse claim has been raised there. A like conclusion was reached in an Arizona case,[74] the argument of the court containing its own refutation.

While it seems illogical that community property under the Idaho view should be liable for the husband's separate obligations,

[71] *In re* Hill's Estate, 167 Cal. 59, 138 Pac. 690 (1914).

[72] *In re* Young's Estate, 123 Cal. 337, 55 Pac. 1011 (1899); Fennell *v.* Drinkhouse, 131 Cal. 447, 63 Pac. 734 (1901). Jurisdiction of probate courts over community property estates will be considered in a subsequent paper.

[73] Ryan *v.* Fergusson, 3 Wash. 356, 28 Pac. 910 (1891); *In re* Hill's Estate, 6 Wash. 285, 33 Pac. 585 (1893); Wiley *v.* Verhaest, 52 Wash. 475, 100 Pac. 1008 (1909). In Doyle *v.* Langdon, 80 Wash. 175, 141 Pac. 352 (1914), substantially the same problem as in Glover *v.* Brown was before the court, and it was held that where what was probably the wife's separate property was inventoried as community property, and the court so found, this finding was conclusive on collateral attack, and there being no fraud, the decree could not be set aside. The Texas court held similarly that a finding that what was perhaps separate property of the wife was community, was conclusive in favor of *bona fide* purchasers from the husband, Alexander *v.* Barton, 71 S. W. 71 (Tex. Civ. App., 1902). In Wiley *v.* Verhaest, *supra*, only the wife's one half interest in the community property was administered upon her death.

[74] Escalada *v.* Wilson, 19 Ariz. 205, 168 Pac. 503 (1917). The court observes, p. 207: "When there is a child or children, instead of the survivor being vested with the entire community property, he is vested with one half only, and the other half vests in the child or children of the deceased. The same law that gives immediate title to the survivor in the community property vests title in the child or children. It is true that one takes title by virtue of survivorship, whereas the other takes as an heir, but both titles are referable to the same statutory provision." See *In re* Williams' Estate (*supra*, note 55) the wife pays an inheritance tax only on the deceased husband's share. See note in Ann. Cas. 1913D, 492.

yet that view is preferable to one which would permit his share of the community property to be so taken.[75] It is of the very essence of the system that the interests of the spouses should be inseverable, except perhaps by their own voluntary acts.[76]

The Texas or Trust Theory

The Texas courts hold that the interests of the spouses are beneficially equal but the legal title is in the husband, the wife's interest being vested but equitable.[77] Yet if the record title should chance to stand in the wife's name,[78] she is the legal owner and holds the husband's interest as a trustee. As a result she can convey a good title to a *bona fide* purchaser even in fraud of the husband.[79] In Texas the husband has with some exceptions the absolute power of alienation as well as the management, and this statutory provision probably at first influenced the court's view in

[75] It is refreshing to find that the court in Ewald *v.* Hufton (*supra*, note 54) did not fall into the error of the Washington court, discussed in the cases cited in note 40, *supra*. The doctrine of *bona fide* purchaser without notice of the community relationship was urged upon the court and the Washington and Texas cases cited. The Texas cases, while correct under the Texas theory, could not be followed in Idaho.

[76] Blum *v.* Rogers, 9 S. W. 595 (Tex., 1888); Johnson *v.* Johnson, 24 Cal. App. Dec. 407, 164 Pac. 421 (1917); Noel *v.* Clark, 60 S. W. 256 (Tex. Civ. App., 1901); Teague *v.* Lindsey, 31 Tex. Civ. App. 161, 71 S. W. 573 (1903); Sharp *v.* Loupe, 52 Pac. 134 (Cal., 1898); Rawlins *v.* Giddens, 5 So. 501 (La., 1894).

[77] Burnham *v.* Hardy Oil Co., 108 Tex. 555, 195 S. W. 1139 (1917); see also 124 S. W. 221, 147 S. W. 330. See also advance sheets of the opinions of the Attorney General, Sept. 10, 1920, at page 298, holding that in Texas husband and wife in rendering separate income-tax returns may each report as gross income one half the total income from community property.

[78] Houston Oil Co. *v.* Choate, 232 S. W. 285 (Tex. Com. App., 1921); Mitchell *v.* Schofield, 106 Tex. 512, 171 S. W. 1121 (1915). In California, however, if community property stands in the wife's name, the husband is still the legal and not merely equitable owner of the whole. Mitchell *v.* Moses, 13 Cal. App. Dec. 75, 117 Pac. 685 (1911).

[79] See among others, Zimpelman *v.* Robb, 53 Tex. 274 (1880); Edwards *v.* Brown, 68, Tex. 329, 4 S. W. 380, 5 S. W. 87 (1887); Burnham *v.* Hardy Oil Co., *supra*, note 77; Kirby Lumber Co. *v.* Smith, 185 S. W. 1068 (Tex. Civ. App., 1916); Johnson *v.* Masterson Irr. Co., 217 S. W. 407 (Tex. Civ. App., 1920); Hill *v.* Moore, 62 Tex. 610 (1884); Patty *v.* Middleton, 82 Tex. 586, 17 S. W. 909 (1892); Pouncey *v.* May, 76 Tex. 565, 13 S. W. 383 (1890); Randolph *v.* Junker, 21 S. W. 551 (Tex. Civ. App., 1892); where, however, there was notice and the rule held not to apply. Mangum *v.* White, 16 Tex. Civ. App. 254, 41 S. W. 80 (1897); Derrett *v.* Britton, 35 Tex. Civ. App. 80, 80 S. W. 562 (1904). But a quitclaim conveyance does not protect a *bona fide* purchaser, Gallup *v.* Huling, 241 Fed. 858 (1917).

respect to the difference in the nature of the interest of the two spouses. The cases, therefore, from this state should have no application in Idaho and Washington, and as above observed such power is expressly denied in Idaho.[80] In Washington, however, the court seems to hold some such view as this, though this doctrine was not applied in *Adams* v. *Black*,[81] where the spouses were cohabiting, the purchaser from the husband having no notice of the latter's marriage. But it does seem to be followed to some extent in Washington in cases where the spouses do not cohabit and the general public has no notice of the relationship. This Texas doctrine of the rights of a *bona fide* purchaser is now statutory in Washington.[82]

The Texas court has not always been consistent in the expression of this proposition that the husband is trustee for the community, though substantially consistent in the application of it. It has sometimes been said that the interests of the spouses were in all respects equal, but it has finally been settled the other way.[83]

It seems probable that Louisiana adopts the Texas theory [84] more nearly than that of any other state, although expressions may be found which point to the California,[85] the Washington,[86] and the Idaho [87] views. It seems clear, however, that the interest of the wife in Louisiana is vested, and that on her one half she does not pay an inheritance tax.[88] The husband cannot alienate in fraud of the wife, but he has the power of alienation.

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[80] Ewald *v.* Hufton, see note 54, *supra*. [81] 6 Wash. 528, 33 Pac. 1074 (1893).

[82] See *supra*, note 46. *Cf.* CALIFORNIA CIV. CODE, § 172 a.

[83] See cases cited in Burnham *v.* Hardy Oil Co., *supra*, note 77, which latter case finally determines that the wife's interest is equitable only.

[84] Succession of McCloskey, 144 La. 438, 80 So. 650 (1919); Beck *v.* Natalie Oil Co., 143 La. 154, 78 So. 430 (1918); Succession of Marsal, 118 La. 212, 42 So. 778 (1907); Dixon *v.* Dixon's Ex'rs., 4 La. 188 (1832); Succession of Teller, 49 La. Ann. 281, 21 So. 265 (1897); Baker's Succession, 129 La. 74, 55 So. 714 (1911). In Curtis' Succession, 10 La. Ann. 662 (1855) it was said that a negotiable paper given by the husband for his individual debts may, unless acquired after maturity, or with notice, be enforced against the community property. Mr. McKay does not agree with this; see MCKAY, COMMUNITY PROPERTY, § 288.

[85] Guice *v.* Lawrence, 2 La. Ann. 226 (1847); Succession of Boyer, 36 La. Ann. 506 (1884); Luria *v.* Cote Blanche Co., 114 La. 385, 38 So. 279 (1905); Peck *v.* Board of Directors, 137 La. 334, 68 So. 629 (1915).

[86] Fletcher *v.* Hodges, 145 La. 927, 83 So. 194 (1919); Garlick *v.* Dalbey, 147 La. 18, 84 So. 441 (1920).

[87] Dixon *v.* Dixon's Ex'rs, see *supra*, note 84.

[88] Succession of Marsal, 118 La. 212, 42 So. 778 (1907). Where the wife bequeaths to her husband her one half interest in the community property, the husband must

The Nature of Community Ownership

The problem of what community ownership is, it should be recalled, is being examined here with reference only to the eight states of the United States which purport to adopt the system, and which have been influenced naturally, in the way they look upon the system, by common-law notions.

What is, then, the nature of the ownership of community property? With the diversity of views outlined above, is it possible to generalize?

First, we observe that in all the states but California the wife has at least a beneficial interest equal to the husband's. California holds that the husband is the owner, not really because he has a larger equitable right in it, but because of a statute which provides that where a person has absolute power of dominion over property he is the owner,[89] thus confusing, as Mr. Justice Holmes suggests, agency with *dominium*.[90] When such power was gradually encroached upon by statute the *dominium* was thought to continue as before. Thus the agency gave rise to the *dominium*, but the revocation of the agency did not alter the *dominium*. So in California one may say, using Louisiana terms, that the wife is a forced heir of the husband in respect to one half of the community property if she survives him. If she is divorced, an equal division should be made, and if none is made they become equal tenants in common.[91] Even while he had the absolute power of alienation he could not alienate for the purpose of defrauding her.[92] If this makes her a mere heir and if she has a mere expectancy it is of a kind not known to the common law.

There are some respects in which this community of spouses resembles in its proprietary aspects, respectively, a partnership and a corporation. And to use feudal terms, this estate in lands bears resemblances also to a tenancy by the entirety, a joint tenancy,

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pay an inheritance tax. Succession of May, 120 La. 691, 45 So. 551 (1908). The view herein expressed is the opinion of Attorney General Palmer also, who in the advance sheets of his opinion of February 26, 1921, at page 435, classes Louisiana with the states where the wife has a vested interest, rather than with California.

[89] Spreckels *v.* Spreckels, 116 Cal. 339, 48 Pac. 228 (1897).

[90] Arnett *v.* Reade, see *supra*, note 28.

[91] Harvey *v.* Pocock, 92 Wash. 625, 159 Pac. 771 (1916); Johnson *v.* Garner, 233 Fed. 756 (1916); Jones *v.* Frazier, 201 S. W. 445 (Tex. Civ. App., 1918).

[92] Smith *v.* Smith, see note 6, *supra*.

and a tenancy in common. In *Holyoke* v. *Jackson*[93] the community is likened to and contrasted with a commercial partnership: It is like a partnership in that some property from one or both forms a common stock which bears the losses and receives the profits and is liable for the common debts; but unlike in that no regard is paid to the proportionate contribution, service, or business fidelity; that each is incapable of disposing of his or her interest; both are powerless to escape the relationship, to vary its terms, or to distribute its assets or profits. In fixity of constitution it resembles a corporation; also it is originated by the state and its powers and liabilities are ordained by statute. *The proprietary interests of the spouses are not merely united but unified; not mixed or blent, but identical.* It is *sui generis* a creature of the statute. Management and disposition may be vested in one or both, but that does not affect the proprietary interests, and the legislature may change such power at will. It is believed by the writer that this statement by the Washington court is a substantially accurate description of the legal concept of the community of husband and wife.

In *LaTourette* v. *LaTourette*[94] the Arizona court declares that by virtue of the statute giving the whole of the community property to the survivor on the death of either, intestate, the community estate is like an estate by the entirety. This seems to be a mistake. It is like that only in the respect that its existence depends on marriage. It is true under a statute like Idaho's that the deceased's share goes to the survivor, but it goes by inheritance and not by the fact of survivorship simply. The court proceeds:

"In this aspect of the community relationship the husband and wife may be considered as one, owning the property during the existence of the marriage with the unities of time, title, and interest and possession present, and at the death of one the survivor takes all. So, in tenancy by the entirety, each one may be regarded as owning all the property with the unities of person, time, title, interest, and possession with a survivorship. A conveyance of real and personal property to a husband and his wife makes them owners by the entirety at common law. They are not seised as joint tenants *per tout et per my*, but by the entirety *per tout et non per my*. But under the statute also, if the deceased have a child

[93] 3 Pac. 841 (Wash., 1882).

[94] See note 55, *supra*.

or children, the survivor is entitled to his or her one-half of the property, and the other half passes to the child or children of the deceased. In this latter feature of the statute there is no right of survivorship, and, except that of possession, the unities are lacking, thus resembling a tenancy in common."

The mistake herein made has already been pointed out, namely, that the survivor does not take the deceased's share by mere survivorship. That question how the survivor takes will be squarely faced when such surviving spouse is called upon to pay an inheritance tax, or when the deceased leaves debts but no separate estate. In fact, save for the necessity of marriage, the interests are more like those in joint tenancy where the parties are seized *per tout et per my*, the survivor having a *jus accrescendi* not found in a tenancy by the entirety. It is believed, however, that they are seized *per my et non per tout*, as in tenancies in common. Two limitations upon estates by the entireties,[95] *viz.*, the fact that there is no power to alienate so as to cut off survivorship, and the fact that such survivorship (if it exist) cannot be cut off under execution against the husband, do not necessarily exist in the case of community tenancy, and in fact in several states do not exist.

This insistence that the community arising between husband and wife, including their proprietary interests, is a thing *sui generis* and not a blend of common-law conceptions, is not mere quibbling, and the difference is often of great importance, especially with reference to separate obligations, probate and administration, and inheritance tax. It seems difficult for the courts to divest themselves wholly of the common way of regarding estates. Naturally the courts of the various states know each its own theory better than it knows the theory of the others, but the importance of understanding the theory which obtains in a different jurisdiction, when the decisions therefrom are being cited, seems to be great, particularly where the case is cited for application by analogy or in collateral matters.

The entity theory adopted in Washington seems sound and to lead most nearly to equality between the spouses. What the social effects have been, whether litigation has increased or decreased, whether the social interest in the satisfaction of obligations has

[95] See 1 TIFFANY, REAL PROPERTY, 2 ed., § 194.

been affected, cannot be accurately gaged at this time. The rights of the husband's creditors and the rights of the wife, so frequently in conflict, seem to find under this view a satisfactory solution, and dependence of the wife is replaced with conjugal interdependence.

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